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Nos. 91-744 and 91-902

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Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR FOCUS ON THE FAMILY, FAMILY RESEARCH COUNCIL, THE LUTHERAN CHURCH—MISSOURI SYNOD, AND AMERICAN FAMILY ASSOCIATION LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

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BRIEF FOR FOCUS ON THE FAMILY, FAMILY RESEARCH COUNCIL, THE LUTHERAN CHURCH—MISSOURI SYNOD, AND AMERICAN FAMILY ASSOCIATION LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

INTEREST OF *AMICI CURIAE*

Amicus Curiae Focus on the Family is a nonprofit organization committed to strengthening the family in the United States and abroad. Focus on the Family's daily radio broadcasts about family issues reach approximately 1.7 million listeners each day in the United States, Canada, and other Western countries via 1,600 radio

stations. These programs are broadcast in 40 foreign countries, including (as of early 1992) 2,500 state-owned stations in the former Soviet Union. Focus on the Family Magazine is received by 2 million households each month.

During the past fifteen years, Focus on the Family has accumulated a wealth of experience and knowledge concerning the effects of abortion on the family unit. From its widespread network of listeners and subscribers, Focus on the Family receives an average of over 33,000 letters each week, many of which describe family traumas. A significant proportion of these letters have borne witness to the traumatic effects of abortion on many American families.

Amicus Family Research Council, a division of Focus on the Family, conducts research and policy analysis related to the family, including the effects of abortion on the family unit and its members: mothers and wives, fathers and husbands, and children.

Amicus The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the ninth largest Protestant body in the United States. It is composed of approximately 5,900 member congregations which, in turn, have approximately 2,600,000 individual members. The Lutheran Church-Missouri Synod holds as a profound belief that human life begins at conception and opposes willful abortion, except as tragically necessitated to prevent the death of the mother. The Lutheran Church-Missouri Synod believes that compassionate alternatives to abortion should be offered to all persons confronted with unwanted pregnancies.

Amicus American Family Association Law Center ("Law Center") is a non-profit legal organization founded in 1989. The Law Center engages in litigation promoting Judeo-Christian pro-family values, including the protection of unborn children from abortion. The Law Center also serves as the legal arm for the American Family Association representing its 450,000 members and 650

chapters. The Law Center is profoundly concerned with the irreparable harm inflicted upon young women who abort their unborn children without proper counseling, without parental or spousal notification, and without comprehensive information on abortion.

Amici share a longstanding concern, based on detailed observation of human behavior, that the abortion floodgate opened in 1973 by this Court has imperiled the traditional strength of American families. Because of their longstanding and proven commitment to the American family, *amici* have a strong interest in legislative measures that seek to limit the harm abortion causes to the family.

Amici accordingly submit this brief concerning Pennsylvania's attempt to protect important family relationships by requiring spousal notice and parental consent prior to certain abortions.

STATEMENT OF THE CASE

This brief treats two parts of the Pennsylvania law challenged by Petitioners Planned Parenthood, *et al.*, the spousal notice requirement and the parental consent requirement.

Section 3209 of the Pennsylvania Abortion Control Act, as amended, requires that in certain circumstances a married woman must notify her husband before she has an abortion. Specifically, the section provides that a married woman, before she has an abortion in a non-emergency situation, must certify either that she has notified her husband that she intends to have an abortion, or that she is exempt from the notice requirement because: (1) her husband is not the father of the child, or (2) her husband could not be located through diligent effort, or (3) the pregnancy is the result of a spousal sexual assault which has been timely reported to authorities, or (4) she has reasons to believe that giving notice to her spouse is likely to result in physical injury to her.

The Pennsylvania legislature enacted this provision for the expressed purposes of promoting the integrity of the marital relationship, protecting a spouse's interest in having children within marriage, and protecting a spouse's interest in protecting the prenatal life of his jointly-conceived child. 18 Pa. Cons. Stat. Ann. § 3209 (Supp. 1991).

For women under the age of 18 who seek an abortion, § 3206 of the Act requires the informed consent of at least one of her parents, but provides an option for the minor woman to seek judicial approval for her abortion in lieu of securing parental consent. *Id.* § 3206.

SUMMARY OF ARGUMENT

Pennsylvania's requirement of notice to spouses prior to certain abortions is a legitimate effort to protect parental rights and familial relationships of a fundamental and compelling nature. The issue of spousal notice intimately concerns (1) the interest of a parent in preserving the opportunity to develop a relationship with his or her offspring; (2) the state's interest in promoting the integrity of marriage; and (3) the interest of an unborn child in having others with interests similar to his or hers be notified of impending action that imperils his or her vital interests.

The spousal notice provision presents this Court with an unavoidable clear-cut choice among multiple "fundamental rights." The interest of a parent in developing a relationship with his or her offspring has long been held to be a fundamental right. Preservation of the integrity of the family has likewise been held to be an interest of utmost importance. State law has consistently, throughout American history, protected the right of *both* spouses to participate in decisions that are central to the destiny of the family. States have also consistently recognized that unborn children, whether termed "potential

human life" or "persons," have judicially enforceable interests.

Against these interests stands the "right to abortion" posited by the majority in *Roe v. Wade*, 410 U.S. 113 (1973). When judged by any of the criteria of fundamental rights—longstanding and consistent recognition in American law and society; rights inherent in the concept of ordered liberty; or rights historically rooted in the conscience of our people—the liberty interest in abortion has far less support than any of the other rights and interests concerned in the spousal notice issue.

Moreover, the modern trend in state law, when the interests and desires of two parents diverge, is to accommodate so far as possible the interests of both mother and father, while promoting above all the best interests of the child. The position of Petitioners goes counter to the overwhelming historic trend of state law by ignoring the interests of one parent of the child. Petitioners further ignore the modern trend in family law by trying to make the mother's interests an absolute and the father's interests a nullity.

Pennsylvania's requirement of parental consent with option of judicial bypass for a minor before she can get an abortion is constitutional. Again, the tradition of state law respecting the role of parents as guardians of their minor children has greater standing in the traditions of the American people and our fundamental rights than the recently decreed "right" to abortion and should prevail over that "right" in this case.

ARGUMENT

The issue of spousal notice presents a direct conflict between different rights that this Court has termed "fundamental." In striking down Pennsylvania's spousal notice requirement, the courts below exalted the "right" to abortion over other rights and interests that have a far stronger claim to be termed fundamental: (1) the right of both parents to an opportunity to develop a relationship with their jointly-conceived children, (2) the state's interest in promoting the integrity of marriage, and (3) the state's interest in protecting the unborn child—or "potential human life" as this Court has used the term.

Parts I, II, and III of this Brief describe the rights and interests that compete with the "right" to abortion in the context of spousal notice. The Brief summarizes this Court's precedents with respect to each competing right, and further sets forth the complex of state laws which have historically protected those rights and which should not be overridden by the far more recently created "right" to abortion. Part IV of the Brief argues that Pennsylvania's parental consent provision is constitutional.

A proper recognition of these competing rights can allow this Court either to (1) overrule *Roe v. Wade*, 410 U.S. 113 (1973), as creating a novelty at war with long-established fundamental rights and interests, or (2) uphold Pennsylvania's spousal notice provision as a legitimate measure that promotes reasonable, and indeed compelling, state interests.

I. PENNSYLVANIA'S SPOUSAL NOTICE REQUIREMENT PROTECTS A PARENT'S FUNDAMENTAL INTEREST IN DEVELOPING AND MAINTAINING A RELATIONSHIP WITH HIS CHILD.

Constitutional law and state family law recognize a fundamental interest of *both* parents to develop a relationship with their children. *See Hodgson v. Minnesota,*

110 S. Ct. 2926, 2962-63 (1990) (Kennedy, J., concurring in part and dissenting in part). Pre-modern common law vested parental rights solely in fathers and gave them unilateral decision making power without regard to the interests of wives and children. *See, e.g.*, 1 W. Blackstone, *Commentaries* *452-53. Recent judge-made abortion law has similarly sought to vest absolute and autonomous decision-making power in mothers, without regard to the interests of fathers and of children in being but not yet born. *See, e.g., Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 71 (1976) ("We recognize, of course, that when a woman with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally."). The absolutist pre-modern approach and the recent abortion law approach stand equally at odds with the consistent modern trend to accommodate evenhandedly, so far as possible, the interests of both parents in developing and maintaining a relationship with their children.

Pennsylvania has explicitly adopted a rule of equal treatment of fathers and mothers with regard to their responsibilities toward their children. *Conway v. Dana*, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974) ("Support, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father."). Pennsylvania should be allowed to further its policy of equal treatment in this case, by requiring notice to a husband that his wife is seeking an abortion, rather than allowing one parent to act unilaterally with absolute power.

A. The parental interest has long been protected by constitutional law.

Constitutional decisions throughout this century have upheld the "fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Stanley v.*

Illinois, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential'. . . .").

Parental rights attach before birth, to the siring and conceiving of children. *Id.* The right of procreation has been upheld as applied to a potentiality of siring a child, before an individual child had been conceived, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and logically applies with even greater force once a specific child has been actually conceived.

The right to procreate applies by definition to "the entire process of bringing a new individual into the world." *Dorlands Illustrated Medical Dictionary* (24th ed. 1965). Just as the state has a compelling interest in potential human life before birth, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452-59 (1983) (O'Connor, J., dissenting), so both parents have a strong interest in the continued life of the child before birth. *Cf. Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 778 n.7 (1986) (Stevens, J., concurring) ("The responsibility for nurturing the soul of the newly born, as well as the unborn, rests with the individual parents, not with the State.") (emphasis added).[1]

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[1] Under state law, fathers' support obligations to their children can apply before as well as after the birth of the child. *See, e.g.*, Iowa Code Ann. § 675.25 (West Supp. 1991); V.I. Code Ann. tit. 16, § 342 (1964); Or. Rev. Stat. § 109.155(4) (1989) (court can order either parent to pay reasonable and necessary prenatal care). Failure to provide support for an unborn child in California is a crime punishable by up to one year in prison. Cal. Pen. Code § 270 (Deering 1985). In one state, a father has been found to have neglected his child *solely* on the ground that he failed to provide support for prenatal care. *In re Matter of Adoption of Doe*, 543 So.2d 741, 746 (Fla. 1989), *cert. denied*, 110 S.Ct. 405 (1989) ("Because prenatal care of the pregnant mother and unborn child

The married father's relationship with his unborn child is defined by an undeniable genetic tie and a legal status flowing from his marriage to the mother.[2] The natural father's biological and genetic tie to his child is as well-established before birth as after. As Justice White has accurately observed, a fetus "is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others." *Thornburgh*, 476 U.S. at 792 (White, J., dissenting).[3] Such unborn children will have an enduring relationship with both parents "if their lives are not ended in the womb." *Id.* at 795. "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

No issue concerning the raising of one's child is more central to this fundamental liberty interest than the question of abortion, *i.e.*, whether a mother will take advantage of the artificially created window of time (con-

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is critical to the well-being of the child and of society, the biological father, wed or unwed, has a responsibility to provide support during the pre-birth period.")

[2] The father's interest in a relationship with his child is strongest when he has participated in bringing the child into being within a marriage. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 & n.3 (1989). *See also Lehr v. Robertson*, 463 U.S. 248, 260 & n.16 (1983) (father's relationship with his natural child is entitled to constitutional protection if he has entered into a traditional marriage with the mother or has otherwise established a relationship with and shouldered responsibility toward the child).

[3] In light of this fact, Petitioners Planned Parenthood *et al.* are far off the mark when they complain that Pennsylvania has not equally required notice for sterilization, prostate operations, and chemotherapy on husbands. Brief at 46-47. These procedures are not comparable to abortions because they do not touch upon a distinct, identifiable, human offspring already conceived.

ception to viability and in many cases to birth) that this Court opened in 1973 for the willful termination of the child's life. Since abortion terminates parental rights and duties toward a specific child, forever, irrevocably, there is no other decision in which the participatory interest of both parents could possibly be stronger. "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

Pennsylvania's spousal notice requirement furthers the father's interest in joint participation. Pennsylvania can reasonably make the judgment that joint participation will lead some mothers to reconsider and decide not to abort the child, when an abortion would surely have resulted were the father frozen out of the process without receiving even notice of his wife's intended decision.

B. The parental interest is consistently protected in various contexts by the family law of the states.

State family law consistently accords a high degree of protection to the parental rights of both parents. Pennsylvania's spousal notice requirement is a mild protection compared to those typically employed by the various states to protect parental rights from arbitrary termination.

For example, because adoption terminates the rights of the natural parents, states require that both natural parents must consent to the adoption unless their parental rights have been terminated.[4] Because of the supreme

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[4] Ala. Code § 26-10A-7 (Supp. 1991); Alaska Stat. § 25.23.040 (1991); Ariz. Rev. Stat. Ann. § 8-106 (1989); Ark. Code Ann. § 9-9-206 (Michie 1991); Cal. Civ. Code §§ 226.1, 226.9 (Deering 1990); Colo. Rev. Stat. § 19-5-203 (Supp. 1991); Conn. Gen. Stat. Ann. §§ 45a-717, 732 (West Supp. 1991); Del. Code Ann. tit. 13, § 908 (1981); D.C. Code Ann. § 16-304 (1981); Fla. Stat. Ann. § 63.062 (West 1985); Idaho Code § 16-1504 (Supp. 1991); Ill. Ann. Stat. ch. 40, para. 1510 (Smith-Hurd Supp. 1991); Ind. Code

importance of the parental interests, states generally require that any and all persons who *may* be a parent of the child up for adoption (such as a putative but not proven father) be given *notice* of the proceeding.[5]

The rights of parenthood exist concurrently with duties toward the child. States enforce a parental duty to support their children financially, a duty which has long

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Ann. § 31-3-1-6 (Burns Supp. 1991); Iowa Code Ann. § 600.7 (West 1981); Ky. Rev. Stat. Ann. § 199.500 (Baldwin 1991); La. Rev. Stat. Ann. § 9:422.3 (West 1991); Me. Rev. Stat. Ann. tit. 19, § 532 (West 1990); Md. Fam. Law Code Ann. § 5-311 (1991); Mass. Gen. Laws Ann. ch. 210, § 2 (West 1987); Mich. Comp. Laws Ann. § 710.31 (West Supp. 1991); Miss. Code Ann. § 93-17-5 (1972); Mo. Ann. Stat. § 453.030 (Vernons 1986); Mont. Code Ann. § 40-8-111 (1991); Neb. Rev. Stat. § 43-104 (1988); Nev. Rev. Stat. § 127.040 (1986); N.H. Rev. Stat. Ann. § 170-B:5 (1990); N.M. Stat. Ann. § 40-7-35 (Michie 1989); N.Y. Dom. Rel. Law § 111 (McKinney 1988 & Supp. 1992); N.C. Gen. Stat. § 48-7 (1991); N.D. Cent. Code § 14-15-05 (1991); Ohio Rev. Code Ann. § 3107.06 (Anderson 1980); Okla. Stat. Ann. tit. 10, § 60.5 (West 1987); Or. Rev. Stat. § 109.312 (1991); 23 Pa. Cons. Stat. Ann. § 2711 (1991); R.I. Gen. Laws § 15-7-5 (1988); S.C. Code Ann. § 20-7-1710 (Law. Co-op. 1985 & Supp. 1991); S.D. Codified Laws Ann. § 25-6-4 (1984); Tenn. Code Ann. 36-1-108 (1984); Tex. Fam. Code Ann. 15.03 (West 1981 & Supp. 1992); Utah Code Ann. § 78-30-4.1 (1992); Va. Code Ann. § 63.1-225 (Michie 1991); Wash. Rev. Code Ann. § 26.33.160 (West Supp. 1992); W. Va. Code § 48-4-3 (1986); Wyo. Stat. § 1-22-109 (1988).

[5] *See* Ala. Code § 26-10A-17(a)(10) (Supp. 1991); Ariz. Rev. Stat. Ann. § 8-106 (1989); D.C. Code Ann. § 16-306 (1989); Del. Code Ann. tit. 13, § 1106 (1981); Ga. Code Ann. § 19-8-12 (Michie 1991); Ill. Ann. Stat. ch. 40, para. 1515 (Smith-Hurd Supp. 1991); Ind. Code Ann. § 31-3-1-6.1 (Burns Supp. 1991); Iowa Code Ann. § 600.11 (West 1981); Me. Rev. Stat. Ann. tit. 19, § 532-C (West 1990); Mich. Comp. Laws Ann. § 710.34 (West Supp. 1991); Minn. Stat. Ann. § 257.74 (West 1982); Mont. Code Ann. § 40-6-129 (1991); N.H. Rev. Stat. Ann. § 170-B:5(a) (1990); N.J. Stat. Ann. § 9:3-45 (West 1991); N.D. Cent. Code § 14-17-23 (1991); Or. Rev. Stat. § 109.096 (1991); S.D. Codified Laws Ann. § 25-6-1.1 (1984); Tenn. Code Ann. § 36-1-111 (1991); Vt. Stat. Ann. tit. 15, § 441 (1989); Wash. Rev. Code Ann. § 26.33.310 (West Supp. 1992); W. Va. Code § 48-4-8 (1986).

existed for the father under common law. *See Dunbar v. Dunbar*, 190 U.S. 340, 351 (1903). The obligation of support, moreover, is enforced on a parent whether or not that parent has custody of the child. *See, e.g., Pasley v. State*, 215 Ga. 768, 113 S.E.2d 454 (1960); *State v. Yocum*, 182 Ind. 478, 106 N.E. 705 (1914). A parent's rights, like a parental duty of support, do not evaporate because the child is in the custody of the other parent. Even if a child is in the sole custody and control of the mother, the parental relationship of a divorced father cannot be terminated without at least affording him notice. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). Custody, whether before or after birth, does not confer absolute rights.

States customarily afford a high degree of protection to parental rights whether the threat to those rights comes from a governmental or private source. For example, states have protected the father's liberty interest in the child's use of his surname from private interference by the mother (even when the mother has custody of the child). *See Norton v. Norton*, 268 Ark. 791, 595 S.W.2d 709 (1980); *In re Marriage of Presson*, 102 Ill. 2d 303, 465 N.E.2d 85 (1984); *Hall v. Hall*, 30 Md. App. 214, 351 A.2d 917 (1976); *Galanter v. Galanter*, 133 N.Y.S. 2d 266 (1954); *De Vorkin v. Foster*, 66 N.Y.S.2d 54 (1946); *Bennett v. Northcutt*, 544 S.W.2d 703 (Tex. Civ. App. 1976).

A state may act to protect a compelling private interest —such as participation by parents in a minor's decision to have an abortion, or participation by a husband in his wife's decision—even if the Constitution does not require that the state provide such protection. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2963 (1990) (Kennedy, J., concurring in part and dissenting in part).

In this case, moreover, Pennsylvania is protecting a husband and father's fundamental liberty interest from a threat that can lawfully arise *only* because of govern-

mental action by the judicial branch. In Pennsylvania, as in most states, abortion was illegal before *Roe*, with narrow exceptions.[6] In requiring spousal notification, Pennsylvania seeks to protect the father's fundamental rights in the face of a novel intrusion into a settled matrix of family responsibilities.

Faced with this Court's decision in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), which effectively delegated to the wife the unilateral power to terminate the husband's interest in their jointly conceived children, Pennsylvania has taken the modest step of providing the married father with the opportunity to participate in the abortion decision, unless he has forfeited his right to participate by sexual assault, abandonment or physical abuse toward his wife. Notice is an effective measure to afford a person an opportunity to present objections and to make his views known. *See, e.g., Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988). Notice is the least that a state should be able to require when the interest at stake is the parent's relationship with his child—perhaps the only child he will ever have.

The father's interest in protecting his relationship with his child stands in obvious conflict with *Danforth* and *Roe*. The father's interest, as reflected in longstanding precedents of this Court and a longstanding pattern of state family law, is of fundamental constitutional dimension. The "right" to abortion, by contrast, was created only recently, in conflict with the laws of virtually all states, and in conflict with other familial rights and interests that have long been rooted in American law and social custom. Given this conflict, the Court should reaffirm the parental interest at issue in the spousal notice provision and should overrule decisions decreeing a "right" to abortion.

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[6] Pennsylvania's prohibition of abortion was more than a century old. *See* Pa. Laws No. 374, tit. VI, §§ 87, 88 (1860).

II. THE SPOUSAL NOTICE REQUIREMENT FURTHERS THE STATE'S INTEREST IN MARITAL INTEGRITY AND LOYALTY.

This Court has recognized that the institution of marriage is central to our society, *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978), and that states have a profound interest in creating and preserving marriage as "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). The state has a strong interest in legislating to further "the relationship of love and duty in a recognized family unit . . . ." *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).

By entering into marriage, a husband and wife agree to be faithful and to have children only through their marital relationship. Were a wife able to abort their jointly-conceived children without notifying her husband, his aspirations for children could be frustrated in secrecy. States have an obvious interest in legislating to prevent such a perversion of the marital relationship. *Scheinberg v. Smith*, 659 F.2d 476, 483-85 (5th Cir. 1981) (state's spousal notice requirement furthers "extremely substantial" interest in integrity of marriage and family life), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982).

Modern family law recognizes marriage as a partnership between equals, in contrast to earlier models treating husband-wife as master-servant or guardian-ward. *See, e.g., Grimditch v. Grimditch*, 71 Ariz. 198, 203-04, 225 P.2d 489, 492-93 (1950) (per curiam), *quoting Cosper v. Valley Bank*, 28 Ariz. 373, 237 P. 175, 176 (1928), *modified on other grounds*, 71 Ariz. 237 (1951); *Cassidy v. Cassidy*, 68 Haw. 383, 387, 716 P.2d 1133, 1136 (1986), *modified on other grounds*, 716 P.2d 1145 (1986) ("time honored proposition that marriage is a partnership . . . ."); *Drumheller v. Marcello*, 516 Pa. 428, 439, 532 A.2d 807, 821 (1987) (Hutchinson, J., concurring) ("If marriage is to be treated as a partnership, as I believe the Divorce Code implies . . . .").

Pennsylvania's effort to involve the husband in the abortion decision furthers the state's concept of equality in marriage. The granting of an absolute abortion power in one spouse alone would run contrary to Pennsylvania's policy of equal treatment of mothers and fathers with respect to familial responsibilities for children. *See Conway v. Dana*, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974).

Pennsylvania also has an interest in requiring married parents to act in the best interest of the marriage, just as a state has an interest in requiring partners to act in the best interest of the partnership. Partnership law, of course, imposes a fiduciary duty on partners to act in the interest of the partnership, not in their own self-interest. *Clement v. Clement*, 436 Pa. 466, 468, 260 A.2d 728, 729 (1970). Pennsylvania is well within its authority when it requires married parents to act in the best interest of the marriage by giving notice to the other spouse of such an important decision for the marriage and family as life or death for an unborn child.

The Pennsylvania Divorce Code states a policy that the interests of the family unit are to be placed above the self-interest of each spouse. 23 Pa. Cons. Stat. Ann. § 3102(3) (1991) ("Give primary consideration to the welfare of the family rather than the vindication of private rights . . . .").

Providing for spousal notice of a critical decision by one marriage partner is an effective way to allow for participation by both spouses in making the decision. Were the courts to strike down a spousal notice requirement, the result would be to give one spouse unilateral power to make a decision striking at the heart of the marriage relationship.

The state has an especially strong interest in requiring notice to a spouse when the other spouse's intended action threatens harm to the family. There is ample evidence that abortions harm marriages and families: by

leading to breakup between the parents of the unborn child, by causing psychological damage to the mother in ways that are of vital interest to her spouse, and by causing psychological harm to the siblings of the aborted child. *See* Brief Amici Curiae of Focus on the Family, and Family Research Council of America, in Support of Appellants at 24-28, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

Moreover, state law has long required some degree of joint participation by spouses in the making of decisions that vitally affect both partners in the marriage. Joint consent is required before a couple can alienate in any way a homestead or homestead exemption,[7] assign wages,[8] or take a mortgage or other lien on household property.[9]

When the issue is the abortion of a child jointly conceived by husband and wife, a state has a far stronger interest in promoting joint decisional participation of the husband and wife than in other situations that merely concern relinquishment of property.

In similar fashion, states generally require joint participation of both spouses before one of them can act to create a parental relationship with a child through adoption.[10] Some states require that, before a wife can re-

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[7] *See, e.g.*, Minn. Stat. Ann. § 525.63 (West Supp. 1992); Okla. Const. Art. XII, § 2; Tenn. Code Ann. § 26-2-301(b) (1980); Wyo. Stat. § 34-2-121 (1990).

[8] *See, e.g.*, Cal. Lab. Code § 300 (Deering 1991); Ind. Code Ann. § 22-2-7-4(a) (Burns 1992); Mont. Code Ann. § 31-1-306 (1991); Neb. Rev. Stat. § 45-144 (1988).

[9] *See, e.g.*, Ariz. Rev. Stat. Ann. § 6-624(B) (Supp. 1991).

[10] *See, e.g.*, Conn. Gen. Stat. Ann. § 45a-732 (West Supp. 1991); Del. Code Ann. tit. 13, § 951 (1981); D.C. Code Ann. § 16-302 (1989); Fla. Stat. Ann. § 63.042 (West 1985); N.D. Cent. Code § 14-15-03 (1991); Ohio Rev. Code Ann. § 3107.03 (Anderson 1980); P.R. Laws Ann. tit. 31, § 532 (1967); S.D. Codified Laws Ann. § 25-6-3 (1984); Utah Code Ann. § 78-30-3 (1992); W. Va. Code § 48-4-2 (1986); Wis. Stat. Ann. § 882.02 (West 1991).

ceive artificial insemination, her husband must consent to the procedure.[11] Most states provide that if the husband does not so consent, he is not treated by law as the father of the child and undertakes no parental duties or obligations.[12]

If joint participation is typically required for creation of an adoptive parental relationship, it is only logical for states to require some form of joint participation for the decision to terminate a parental relationship.

The fact, of course, is that parenting is a *joint* activity of husband and wife. Were it not for the intensive effort of the recent pro-abortion movement, it would seem a tautology that the creation of parent-child relationships is a mutual voluntary act of father and mother (Pennsylvania excludes from the spousal notice requirement

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[11] *See, e.g.*, Ark. Code Ann. 9-10-202 (Michie 1991); Conn. Gen. Stat. § 45a-772 (West Supp. 1990); Idaho Code § 39-5403 (Supp. 1991) (Effective July 1, 1993); Kan. Stat. Ann. § 23-128 (1988); Ohio Rev. Code Ann. § 3111.34 (Anderson Supp. 1991); Okla. Stat. Ann. tit. 10, § 553 (West 1987).

[12] Ala. Code § 26-17-21 (1986); Ark. Code Ann. § 9-10-201, 202 (1991); Cal. Civ. Code § 7005 (Deering 1991); Colo. Rev. Stat. § 19-4-106 (Supp. 1991); Conn. Gen. Stat. Ann. §§ 45a-772, 774 (West Supp. 1991); Ga. Code Ann. § 19-7-21 (Michie 1991); Idaho Code §§ 39-5403 (Supp. 1991) (Effective July 1, 1993), 39-5405 (1985); Ill. Ann. Stat. ch. 40, para. 1452, 1453 (Smith-Hurd Supp. 1991); Kan. Stat. Ann. §§ 23-128-130 (1988); Mass. Gen. Laws Ann. ch. 46, § 4B (West 1991); Minn. Stat. Ann. § 257.56 (West Supp. 1992); Mo. Ann. Stat. § 210.824 (Vernons 1992); Mont. Code Ann. § 40-6-106 (1991); Nev. Rev. Stat. § 126.061 (1986); N.J. Stat. Ann. § 9:17-44 (West 1991); N.M. Stat. Ann. § 40-11-6 (Michie 1989); N.C. Gen. Stat. § 49A-1 (1984); N.D. Cent. Code §§ 14-18-01, -03 (1991), Ohio Rev. Code Ann. 3111.34 (Anderson Supp. 1991); Okla. Stat. Ann. tit. 10, §§ 551-554 (West 1987 & Supp. 1992); Or. Rev. Stat. § 109.239 (1991); Tenn. Code Ann. § 68-3-306 (1987); Tex. Fam. Code Ann. 12.03 (West Supp. 1992); Va. Code Ann. § 20-156 (Michie Supp. 1991); Wash. Rev. Code Ann. § 26.26.050 (West 1986); Wis. Stat. Ann. § 891.40 (West Supp. 1991); Wyo. Stat. § 14-2-103 (1986).

those exceptional situations in which conception results from other than a voluntary act).

The right to limit one's future options is one that our law has traditionally respected; indeed it is the foundation of the law of contracts.[13] Individuals have long enjoyed the ability to enter voluntarily into relationships, such as partnership and marriage, in which some forms of self-interest are willingly sacrificed to the common good. Nowhere does the state have a stronger interest in holding individuals to such voluntary commitments than when the common good is the good of a family, and the resultant good of the child. Absolute autonomous power to make purely self-interested decisions is something that spouses give up when they enter voluntarily into a legal relationship that presumes a commitment to fidelity and to offspring. Pennsylvania's spousal notice provision, therefore, simply follows logically from the facts of married life.

III. THE SPOUSAL NOTICE REQUIREMENT FURTHERS THE STATE'S INTEREST IN PROTECTING POTENTIAL HUMAN LIFE.

By requiring notice to a married father of the impending abortion of his child, the Pennsylvania law allows participation by a natural advocate of the child's best interests. A parent is the natural guardian of his of her child. When one parent has taken a position hostile to the interests of the child, a state has a particularly strong interest in securing the involvement of the

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[13] "A contract is a promise, or a set of promises, to which the law attaches legal obligation." 1 S. Williston, *The Law of Contracts* 1 (1st ed. 1920). "The term promise . . . contemplates action or forbearance in the future . . . ." 1 *A Treatise on the Law of Contracts* 10 (R. Lord ed., 4th ed. 1990). "[A]n apparent promise which makes performance optional with the promisor according to its terms is in fact no promise. . . . Such an expression is often called an illusory promise." *Id.* at 11.

"The fundamental element of promise seems to be an expression of intention by the promisor that his future conduct shall be in

other parent as a potential advocate of the child's interest in health and safety.

It has long been common ground in all states and all family law contexts that state authorities must look to the best interests of the child. *See, e.g.*, Foster & Freed, *Life with Father: 1978*, 11 Fam. L.Q. 321, 343-63 (1978); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 Law & Contemp. Probs. 226, 236-37 & nn. 45-47 (1975); *United States v. Green*, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256) (Story, J.) (the court will "look into all the circumstances and ascertain whether it will be for the real, permanent interests of the infant . . . .").

The laws of the several states recognize that unborn children have justiciable interests in property, health, safety and life. *See* Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231, 252-54. Prenatal injuries to unborn children are actionable and compensable in all jurisdictions. *See* W. Prosser, *Law of Torts* ch. 9, § 55, at 336-37 (4th ed. 1971). At present, the majority of states recognize a cause of action for wrongful death when a viable fetus is stillborn as a result of tortious negligence.[14] Several states allow such an action even for an

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accordance with his present expression, irrespective of what his will may be when the time for the performance arrives." 1 A. Corbin, *Corbin on Contracts* 37 (1963).

[14] The court in *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949) was the first to allow an action for the death of a stillborn, viable fetus. Today, at least thirty-one other jurisdictions recognize such an action. *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Simmons v. Howard University*, 323 F. Supp. 529 (D.D.C. 1971); *Porter v. Lassiter*, 91 Ga.App. 712, 87 S.E.2d 100 (1955); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982); *Chrisafogeorgis v. Brandenberg*, 55 Ill.2d 368, 304 N.E.2d 88 (1973); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (Iowa 1983); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell v.*

unborn child who was not viable.[15] Moreover, mothers and fathers can be held criminally responsible by a state for failure to provide medical care or other support for their unborn child.[16]

States provide for the appointment of guardians for unborn children to vindicate the various rights described above.[17] The parents are the natural guardians of their

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Couch, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So.2d 633 (La. 1981); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W. 2d 785 (1971); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar v. St. Vincent Hospital*, 95 N.M. 150, 619 P.2d 826 (1980); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984); *Stidham v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974); *Presley v. Newport Hospital*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975); *Vaillancourt v. Medical Center Hosp.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen v. Hanson*, 85 Wash.2d 597, 537 P.2d 266 (1975); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mutual Automobile Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

[15] *Presley v. Newport Hospital*, 117 R.I. 177, 365 A.2d 748 (1976); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (Child was "quick" though nonviable).

The majority of states that have addressed the question have held to the contrary. *See, e.g., Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

[16] *See e.g.*, Cal. Pen. Code § 270 (Deering 1985).

[17] Mass. Ann. Laws ch. 79, § 30 (Law. Co-op. 1969); Mich. Comp. Laws Ann. 600.2045 (West 1981) (not limited to probate); Minn. Stat. Ann. § 501B.19 (West 1981); Miss. Code Ann. § 93-13-7 (Supp. 1991) (non-probate situation); S.D. Codified Laws Ann. § 26-1-2 (1984) (conceived unborn child deemed existing person

children, and generally have the right under state law to be appointed as the guardian of their child unless there is a showing that they are unfit or adverse to the child's interests.[18] If one parent is adverse to the child's interests, the natural guardian is logically the other parent.

Pennsylvania has acted consistently with the general structure of state family law by requiring *notice* to a natural guardian of the unborn child when the child faces a life-threatening situation. States generally require notice to representatives of unborn children in other matters that affect the child's interests.[19] The state's interest in requiring notice is strongest when the child's interest at stake is life itself.

IV. PENNSYLVANIA'S PARENTAL CONSENT REQUIREMENT IS CONSTITUTIONAL.

This Court has consistently held that any potential burden caused by a parental notification or consent statute is vitiated if it provides a judicial bypass option that comports with the requirements of *Bellotti v. Baird*, 443

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insofar as necessary to protect all interests that child will have at birth).

[18] *See, e.g.*, Ark. Code Ann. § 9-9-220 (Michie 1991).

[19] Notice must be given to representatives of unborn in estate and other matters. Alaska Stat. § 13.06.120(4) (1985); Ariz. Rev. Stat. Ann. § 14-1403 (1975); Cal. Prob. Code §§ 1003, 15405 (Deering 1991) (consent of unborn); Colo. Rev. Stat. § 15-10-403 (1987) (notice to unborn or representative required); Conn. Gen. Stat. Ann. § 45a-132 (West Supp. 1991); Del. Code Ann. tit. 12, § 2905(e) (1987); Ind. Code Ann. § 29-1-1-20 (Burns 1989); Ky. Rev. Stat. Ann. § 389A.035 (Michie 1984); Me. Rev. Stat. Ann. tit. 18-A, § 1-403(3) (1981) (notice); Mass. Ann. Laws ch. 79, § 30 (Law. Co-op. 1991); Mich. Comp. Laws Ann. § 600.2045 (West 1981) (non-probate); Minn. Stat. Ann. § 501B.19 (West 1980); Miss. Code Ann. § 93-13-7 (Supp. 1991) (domestic relations, wills); Mont. Code Ann. § 72-35-313 (1991); Ohio Rev. Code Ann. § 2307.13.1 (Anderson 1991); Okla. Stat. Ann. tit. 12, § 1147.3 (West 1988); Or. Rev. Stat. § 109.125 (1991) (paternity-related).

U.S. 622, 643-44 (1979) ("*Bellotti II*").[20] *See Hodgson v. Minnesota*, 110 S. Ct. 2926, 2950-51 (1990) (O'Connor, J., concurring); *id.* at 2970 (Kennedy, J., concurring in part and dissenting in part);[21] *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2978-81 (1990). *Bellotti II* sets out the constitutional requirements for a bypass procedure:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Bellotti II, 443 U.S. at 644. The Pennsylvania Act's bypass procedure complies explicitly with each of the above requirements.[22]

Moreover there is no support in our traditions or history for the notion that a minor has a fundamental right to an abortion without her parents' consent. Our legal traditions recognize the right of parents to control their

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[20] "We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Bellotti II*, 443 U.S. at 643.

[21] "The simple fact is that our decision in *Bellotti II* stands for the proposition that a two-parent consent law is constitutional if it provides for a sufficient judicial bypass alternative." *Hodgson*, 110 S.Ct. at 2970 (Kennedy, J.).

[22] The court below painstakingly compared each relevant provision with *Bellotti II* requirements. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 628, 708-09 (3d Cir. 1991).

children's upbringing. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (Anglo-American law has "historically . . . recognized that natural bonds of affection lead parents to act in the best interests of their children."); *see* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U.L. Rev. 605, 615-19. Accordingly, common law courts were extremely reluctant to interfere in the parent-child relationship as long as the parents did not treat their children cruelly or inhumanely. *See, e.g., Recent Development, Minor's Rights to Medical Care*, 14 J. Fam. L. 581, 581-83 (1975). This strong tradition of parental control continues today. Every state limits the participation of minors in a substantial number of activities in which adults may engage, such as marriage, voting, or driving a car.[23]

This Court's decisions, rendered in a variety of constitutional contexts, reflect the same understanding. The Court has long recognized that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Consequently, this Court has repeatedly acknowledged that "a natural parent's 'desire for and right to the companionship, care, custody, and management of his or her children'" is itself a significant liberty interest. *Santosky v. Kramer*, 455 U.S. 745, 758-

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[23] Such restrictions "reflect the simple truth derived from our communal experience, that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life." *Stanford v. Kentucky*, 109 S. Ct. 2969, 2988 (1989) (Brennan, J., dissenting).

59 (1982) (citations omitted); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 119-22 (1989) (plurality opinion); *H.L. v. Matheson*, 450 U.S. 398, 410 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923). Indeed, if there is a fundamental right implicated by this issue, it is the right of parents to direct the upbringing of their children, not the right of children to evade parental control.

The conclusion drawn from the general historical understanding of parent-child relations is reinforced by more specific considerations of the traditions regarding the provision of medical treatment to children. The rule of common law was that a physician could not treat a minor without parental consent. W. Keeton, *Prosser and Keeton on the Law of Torts* ch. 4, § 18, at 115 (5th ed. 1984). Over time, common law courts developed limited exceptions to this rule for emergencies, emancipated minors, relatively safe operations for mature minors, and necessary lifesaving treatment. *Id.* at 114-18; L. Nolan, *The Legal Status of Parent and Child 1986* 161-172 (1987). But all jurisdictions today still follow the common-law rule unless it has been modified by case law or statute. L. Nolan, *supra*, at 161. See *Stanford*, *supra*, 109 S. Ct. at 2988 (Brennan, J., dissenting) (37 states by statute fix 18 as the age of consent for medical treatment); *Bowen v. American Hospital Association*, 476 U.S. 610, 627-28 & n.13 (1986) (plurality opinion) (summarizing current law).

CONCLUSION

For the reasons stated above the Court should uphold Pennsylvania's spousal notice and parental consent requirements and should overrule recent precedents decreeing a "right" to abortion.

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